

801.1(b)  
801.11

March 17, 1989

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Patrick Sharp, Esquire  
Premerger Notification Office  
Bureau of Competition  
Room 303  
Federal Trade Commission  
6th Street & Pennsylvania Ave., N.W.  
Washington, D.C. 20580

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NOTIFICATION  
OFFICE

Dear Mr. Sharp:

This will confirm our telephone conversation of March 16, 1989, in which you advised me as follows:

1. Determination of what persons are "included within" an entity, for the purpose of determining whether that person should be consolidated with the entity under 16 C.F.R. § 801.11 (b)(1) in establishing "size of person," is to be made as of the date the transaction at issue is proposed to be consummated. Our client, "X," had control of a corporation, "Y," at calendar (and fiscal) year end because, although "X" owned less than 50% of the outstanding voting securities of "Y," "X" had the contractual right presently to designate a majority of the directors of "Y." "Y" had more than \$100 million in sales and assets, and if, because of "control" by "X" over "Y," "Y" was a person "included within" "X" under 16 C.F.R. § 801.11(b)(1), "X" would have had more than \$100 million in sales and assets after consolidation with "Y." "X" will have disposed, however, of all of its voting securities in "Y," and of its rights to designate directors of "Y," before the transaction at issue is consummated. After disposing of "Y," the only substantial assets "X" will have will consist of cash, in an amount substantially less than \$100 million; "X" will have had no sales other than those made by "Y." As long as the ultimate parent of the other party to the transaction at issue has less than \$100 million in sales or assets, no report will be required because "X" will not be viewed as having more than \$100 million in sales or assets.

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2. The only "control" test applicable to a limited partnership is the test set forth in 16 C.F.R. § 801.1(b)(1)(ii) ("50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity"). The alternative test set forth in 16 C.F.R. § 801.1(b)(2) (right to designate a majority of directors or individuals exercising similar function in the case of unincorporated entities) is not applicable to limited partnerships, as per example 2 to 16 C.F.R. § 801.1(b). A sole general partner of a limited partnership that does not have the interests or rights described in 16 C.F.R. § 801.1(b)(1)(ii) would therefore not "control" the limited partnership.

Our client intends to close a transaction without filing any report in reliance, in part, on this advice. If I have misstated or misinterpreted your advice, or if further information is necessary to confirm your advice, I would appreciate your letting me know right away.

Sincerely

(PS)

I concurred

called Mr. [REDACTED]

3-20-89